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620599—61——1

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

McCRORY HOLDING COMPANY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on September 1, 1961.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 15–28) is reported at 294 F. 2d 812.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1961 (App. B, *infra*, p. 29). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

When, after the expiration of a temporary taking, the United States retains possession of the land without the consent of the owner and immediately files a complaint to condemn the fee, is the property to be valued for the purposes of determining just compensation as of that time or later (as the court of appeals held) as of the date of the trial or the date on which the government files a declaration of taking?

STATUTES INVOLVED

The condemnation complaint in this case was filed pursuant to the Act of August 1, 1888, 25 Stat. 357, as amended, 40 U.S.C. 257. It provides as follows:

> In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the Attorney General of the United States, upon every application of the Secretary of the Treasury, under this section and section 258 of this title, or such other officer, shall cause proceedings to be commenced for condemnation within thirty days from receipt of the application at the Department of Justice.

The Declaration of Taking Act, 40 U.S.C. 258a–f, provides in pertinent part as follows:

> In any proceeding in any court of the United States outside of the District of Columbia

which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. * * *

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court. * * * [40 U.S.C. 258a].

STATEMENT

This case deals with the date as of which property condemned by the United States is to be valued for purposes of determining just compensation. It involves land acquired in connection with the Orlando Air Force Base in Orange County, Florida. The pertinent facts, as stipulated by the parties (R. 78–86), may be summarized as follows:

1. In 1942 more than 500 acres, including all the lands here involved, were leased to the United States (R. 78). The United States remained in possession under the original and subsequent leases until their terms expired on June 30, 1953 (*ibid.*).

On September 3, 1953, the United States filed a complaint (Case No. 624 Orl. Civ.) to condemn approximately 255 acres—

> for a term of years ending June 30, 1954, extendible for additional yearly periods thereafter until June 30, 1958, at the election of the Secretary of the Air Force, notice of which election shall be filed in the proceeding at least thirty (30) days prior to the end of the term hereby taken, or subsequent extensions thereof * * * [R. 80].

The 255 acres were part of the property previously leased. The complaint stated (R. 80) that the United States had been in continuous possession of the 255 acres since July 1, 1953, and asked for an order of possession. No such order was entered, but on January 8, 1954, the government filed a declaration of taking covering those acres (*ibid.*).

The United States gave notices of election which successively extended the term to June 30, 1957, and remained in possession to that date (R. 81). It gave no notice extending the term beyond June 30, 1957.

2. The United States filed the present action (Case No. 857 Orl. Civ.) on July 2, 1957 (R. 84). "The plaintiff was in possession at the time of all of said tracts as it had a right to be under the provisions of the estate taken in Case No. 624 Orl. Civ. * * * except tract No. 414–E–2" (R. 84). The leasehold expired on June 30, 1957, and the suit was one to condemn the fee title to approximately 51 acres, as well as various easements and other interests in seven other tracts of land (*ibid.*). With the exception of one tract (414–E–2) containing 1.89 acres, in which the government took a 15-year easement for sewage treatment facilities, all of the lands covered by the complaint in this action (Case No. 857) had previously been included in the temporary taking involved in Case No. 624 (R. 84; see App. C, *infra*, p. 30).

The filing of Case No. 857 had been requested by the Secretary of the Air Force by letter to the Attorney General, dated June 28, 1957 (R. 29, 84), which also—

> requested that an order be procured from the court granting possession of the land to the United States effective as of 1 July 1957.[1]

Although the complaint requested an order of immediate possession, no such order was entered and no motion therefor was made by the United States (R. 85).

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[1] June 28 was a Friday. The intervention of a weekend was presumably the reason the case was filed on July 2 rather than on July 1.

"[N]or has the Government through any of its agencies notified the landowners that it has discontinued possession under Case No. 624 Orl. Civ., as to any part of said 255.07 acres. Nor has the United States, as Plaintiff in Case No. 857 Orl. Civ., or otherwise, ever advised the landowners that it is in possession of any part of said land pursuant to Case No. 857 Orl. Civ." (*ibid.*).

At the request of the Secretary of the Air Force, amended complaints were filed on October 2, 1958 and December 8, 1958 (R. 28–77, 85). The amendments provided for the acquisition of additional land and additional interests in portions of the land already involved in the proceeding, the revision of the description of certain tracts, and the deletion of other tracts. Each of the two amended complaints, like the original complaint, asked, as requested by the Secretary (R. 29, 54), for an order of immediate possession (R. 31, 56). No such order was entered (R. 85).

On the basis of the foregoing stipulated facts, the parties requested the district court to determine, in advance of trial, the date as of which the several tracts were to be valued (R. 90). On April 9, 1959, the court held that the property would be valued as of the date of trial (*ibid.*). The United States filed a timely petition for rehearing (R. 90–91), and also moved the court to amend its order fixing the time of valuation to include the necessary recital under the Interlocutory Appeals Act (28 U.S.C. 1292(b)) (R. 92–93).

While the foregoing motions were pending, the United States, on November 20, 1959, filed a declaration of taking and deposited with the court estimated compensation totaling $292,232 (R. 94–114). On March 16, 1960, it filed a third amended complaint (R. 115–130), which conformed the second amended complaint to the declaration of taking.

On May 16, 1960, the district court entered the order from which this appeal was taken (R. 131–136). It fixed November 20, 1959—the date on which the declaration of taking was filed—as the date of valuation (R. 135). It also made the requisite findings for appeal under the Interlocutory Appeals Act (R. 135–136).

3. The Court of Appeals for the Fifth Circuit affirmed. The court stated (App. A, *infra*, pp. 25–27, emphasis in original) that, in the earlier condemnation case (No. 624), the district court had entered an order providing that, in its final judgment, it "will also retain jurisdiction for the payment of just compensation for any occupancy by the Plaintiff after the expiration of the terms which may be condemned or extensions thereof * * * *for whatever purpose said continued occupancy may be*"; and that, under the stipulation that the United States was in possession of the tracts under the estate taken in Case No. 624 when it filed its condemnation complaint on July 2, 1957, and has not notified any of the landowners that it had discontinued possession under that case (see *supra*, p. 5), "the character of the possession by the United States of the interests in the lands sought

to be condemned in this action (No. 857), filed July 2, 1957, was that fixed by the course of dealings between the parties, including the still pending judicial proceeding."

The court rejected the government's contention that this case is governed by *United States* v. *Dow*, 357 U.S. 17 (App. A, *infra*, pp. 20–27). In *Dow*, this Court held that where the United States, after filing a condemnation action, entered into physical possession of the property, the owner's claim for just compensation arose at the time physical possession was taken, rather than three years later when the United States filed a declaration of taking covering the same property. The court below stated (*id.*, p. 27) that the government's possession in the present case "bears no resemblance to the kind of possession the Government would have taken under the 'physical seizure' method of obtaining possession which is discussed in the *Dow* case." The court further stated (*id.*, p. 27) that the interests covered by the declaration of taking "differed materially" from the interests described in the original condemnation complaint filed on July 2, 1957, and that "[t]o take care of these changes" the government had filed two amendments to its original complaint, and a third amendment after the declaration of taking to conform the complaint to the latter. The court concluded (*id.*, p. 28):

> It is clear that the Government was uncertain as to exactly what it wanted until the time it filed the declaration of taking November 20, 1959. * * * Not until that time had it determined exactly what it desired to appropri-

> ate, and not until that time did it perform any overt act fixing the extent and terms of its appropriation and the precise rights of the landowners to compensation. * * * We think it is clear that the first appropriation or taking which fixed the right of the United States to possess and of the landowners to collect just compensation was the declaration of taking of November 20, 1959, and that the court below correctly fixed that date as the time of taking.

REASONS FOR GRANTING THE WRIT

1. The court of appeals held that the landowners' right to just compensation did not arise until the government filed a declaration of taking on November 20, 1959—more than 28 months after it had filed its condemnation complaint. This holding is contrary to the principles enunciated by this Court in *Dow* v. *United States*, 357 U.S. 17, for determining when a claim for just compensation arises.

In the *Dow* case, the United States, after filing a condemnation action, had entered into physical possession of the property, pursuant to court order. Three years later the government filed a declaration of taking covering the same property. This Court held that the owner's claim for just compensation arose when physical possession was taken, rather than when the declaration of taking was subsequently filed. The Court stated (p. 22) that the "usual rule is that if the United States has entered into possession of the property prior to the acquisition of title, it is the former event which constitutes the act of taking." It ruled (p. 23) that "when the Government files a

declaration of taking before it has entered into possession of the property the filing constitutes the 'taking.' But * * * where a declaration is filed *after* the Government has taken possession * * * the date of 'taking' is the date on which the Government entered and appropriated the property to public use."

In the present case, when the government filed its condemnation complaint on July 2, 1957, it was already in possession of the property through having previously condemned a leasehold interest and then keeping possession after it expired. The keeping of possession plus the filing of a complaint to condemn the fee were the acts by which the government "appropriated the property [the fee] to public use." By those acts the United States was asserting its authority, previously exercised in keeping possession of the property, to appropriate the landowners' entire interest in it. It was accordingly those acts—and not the subsequent filing of the declaration of taking—"which fixed the right of the United States to possess and of the landowners to collect just compensation" (App. A, *infra*, p. 28). The obvious purpose of the declaration of taking was to protect the government against further loss as a result of the district court's ruling that the property would be valued in a rising market as of the date of trial. The declaration would fix a cut-off date for valuation and thus avoid still further increases in what would ultimately have to be paid; it was also intended to stop the running of interest.

The court of appeals attempted to distinguish the *Dow* case upon the ground that in *Dow* the entry into possession was itself a hostile seizure constituting a "taking" whereas in the instant case the United

States peacefully entered under a consensual lease, continued in possession under a leasehold acquired by eminent domain, and after the expiration of the term remained as an overstaying tenant. But whatever may be the rule where the United States initiates condemnation proceedings while it is in possession under an unexpired lease, in the present case its possession was no less adverse to the former owner than in *Dow*. The leasehold acquired by eminent domain expired on June 30, 1957. There was no notice of renewal. Nevertheless the government did not vacate. It continued to hold possession and, two days later,[2] it filed a complaint to condemn a fee interest in the land. Since the government was in possession and respondent did not challenge its right, no order awarding possession was necessary or obtained. It is plain, nevertheless, that the government was in possession after June 30 (or at the latest July 2) not under the expired leasehold but under a taking of the fee. The *Dow* decision is therefore squarely applicable; and the decision below is wrong.

There is nothing inconsistent with this analysis in the sentence in the stipulation of facts (R. 84) reciting that the "plaintiff was in possession at the time of all said tracts as it had a right to be under the provisions of the estate taken in Case No. 624 Orl. Civ." Although the phrase "at the time" could grammatically refer to the date on which the complaint was filed, a careful reading of the full paragraph shows that no such precise reference was intended. First, it is obvious that the United States had no right to be

[2] The delay was due to the intervention of a weekend.

in possession of the land after June 30, 1957, under the provisions of the leasehold, for it was taking no steps to vacate the property or to restore it to its former condition. Second, the very next sentence in the paragraph refers back to a letter written during the term of the leasehold on June 28, 1957, clearly expressing the intentions of the acquiring agency. For both reasons, it is apparent that the sentence was intended simply to explain how the United States came to be in possession of the land and not to describe the legal source of its possession after June 30, 1957.

2. The court of appeals also reasoned (App. A, *infra*, pp. 27–28) that since the property interests covered by the condemnation complaint "differed materially" from the property covered by the declaration of taking, "[n]ot until that [latter] time had [the government] determined exactly what it desired to appropriate, and not until that time did it perform any overt act fixing the extent and terms of its appropriation and the precise rights of the landowners to compensation." This ruling exaggerates the extent, and misinterprets the significance, of the differences between the property interests involved in the two proceedings. We have set forth in Appendix C, *infra*, p. 30, a table showing the differences. The principal value of the property interests taken lies in two fees. In the original complaint, their respective areas were 20 acres and 31.57 acres. In the declaration of taking, those areas were increased to 20.33 and 39.72 acres, respectively. The increase in the first tract is plainly minimal. The additional acreage taken in the second tract, while substantial,

does not justify treating the major portion of that tract (31.57 acres) as not having been taken until the declaration of taking was filed. On the contrary, all that it establishes is that the additional area should be valued as of that date, since that is when those 8.15 acres were appropriated to the public use. The other changes made by the declaration of taking—primarily in the kind and location of various easements taken—are not so substantial as to justify the conclusion of the court of appeals (App., *infra*, p. [illegible]) that not until the declaration of taking was filed had the government "determined exactly what it desired to appropriate."[3] Such "alteration[s] in the property interest taken" do not change the date of taking; nor do they "prejudice the property owner," since he is compensated for whatever interests the government ultimately acquires. See *Dow* v. *United States*, 357 U.S. at 26.

3. The question whether, when the government already is in temporary possession of real property, the claim to just compensation for the taking of the fee arises when the government files an action to condemn that interest, or at some later date, is important in the conduct of federal condemnation proceedings. The leasing or condemnation by the fed-

[3] Changes in the sewage, water and access easements were made primarily to make them perpetual and to change their location or description to some extent. Such changes frequently occur with regard to easements of that nature. Except for the 20-acre easement in the Lake, as to which the reason for exclusion from the declaration of taking does not appear, the easements represent some 6% by area (4.58 acres of the 64.23 acres), and much less of the estimated value, of the total acreage involved.

eral government of temporary interests in real property is a wide-spread practice, and the government frequently condemns the fee interest after it has entered into temporary possession. In the present case, there apparently has been a substantial increase in the value of the land during the 28-month interval between expiration of the temporary taking and filing of the declaration of taking. During the current period of rising real estate values, the rule promulgated by the court below will substantially increase the cost of federal condemnation. Furthermore, the decision below, by limiting the *Dow* case to the situation where the entry into possession occurs after the condemnation suit is filed, could lead to the same type of manipulations, operating to the disadvantage of either the landowner or the government, that the *Dow* rule was designed to prevent. See *Dow*, 357 U.S. at 25. The decision below, unless reviewed, will also generate unnecessary further litigation as to the meaning of *Dow*.

CONCLUSION

For the foregoing reasons, it is submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

ROGER P. MARQUIS,
Attorney.

NOVEMBER 1961.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 18405

UNITED STATES OF AMERICA, APPELLANT, VERSUS McCRORY HOLDING COMPANY, ET AL., APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

(September 1, 1961)

ROGER P. MARQUIS, Attorney, Department of Justice [with him on the brief were former Assistant Attorney General PERRY W. MORTON and former United States Attorney E. COLEMAN MADSEN], for appellant.

J. R. WELLS for appellee.

Before CAMERON and BROWN, Circuit Judges, and HANNAY, District Judge.

CAMERON, Circuit Judge: This interlocutory appeal involves the correct determination of the time of the taking of several parcels of land or interests therein to the end that such time may be fixed before the eminent domain proceedings are brought to the stage of ascertaining and fixing the amount of the damages. The lands and interests the appellant United States seeks to acquire by this action are to provide a strategic addition to the Orlando Air Force Base in Florida. The facts are not in dispute, being established by public records and stipulations entered into between the parties. The main facts and the court's opinion

of the law are set forth in its order of May 16, 1960, from which this appeal is taken. The major portion of the order is copied here as a correct statement of what is before this Court:

> "This cause coming on to be heard upon petition of Plaintiff for rehearing of the Order entered herein on April 9, 1959, and also upon plaintiff's motion filed April 17, 1959, to amend said order of April 9, 1959, and also upon Plaintiff's further motion served May 6, 1960, and after hearing argument of counsel for the respective parties and upon due consideration the Court being fully advised in the premises, this Court finds and does hereby
>
> "ORDER that, in view of the Court's desire to incorporate into its order the finding requested in said Motion to Amend and further in view of the filing herein on November 20, 1959, of the Declaration of Taking herein and of the filing on March 16, 1960, of the Third Amended Complaint herein, said Order of April 9, 1959, is hereby amended to read as follows:
>
> " 'Defendant owners in 1942 leased over 500 acres of land to the United States. The leases embraced all tracts involved in this action, including tracts brought in by the amended complaint. The leases expired on June 30, 1953. The Government remained in possession of portions of the 500 acres.
>
> " 'The Government on September 3, 1953 filed a complaint (Case No. 624 Orl. Civ.) for condemnation of a leasehold of 255.07 acres out of the aforementioned 500 acres. The condemned term was to end June 30, 1954, but included the provision that yearly extensions until June 30, 1958 could be obtained by the Government by filing 30-day notices of election. About four months after filing the complaint and on January 8, 1954, the Government filed a declaration of taking and paid $20,135 into Court intended to cover the year ending June 30, 1954. The

Government exercised its extension powers for an additional three years, the last of which ended June 30, 1957, and made further deposits for each year. The Government remained in possession as a holdover tenant after June 30, 1957.

"'On July 2, 1957, the Government filed the original complaint herein, seeking to take the fee and easements in various tracts totalling 87.9 acres. All of the tracts except one were a part of the 255.07 acres mentioned above. Tract 414–E–2 was not included in Case No. 624 Orl. Civ. The tracts belonging to these defendants may be placed in the following categories:

[Paragraph omitted.]

"'On October 2, 1958 the Government filed its first amended complaint in this case seeking to increase the estates taken as to Tracts 414–E–1 and 414–E–2 from temporary easements to terms of years for the same period. It also sought condemnation of additional temporary easements over Tracts 414–E–S and 414–E–9. In addition such amended complaint clarified a previous demand by setting up a claim for a temporary easement over Tract 420–E. The parties stipulate that Tract 414–E–6 was dismissed. The second amended complaint was filed December 8, 1958.

"'On November 20, 1959, Plaintiff filed its declaration of taking herein, the estimated compensation [in the sum of $292,232.00] set out in said declaration of taking having been paid into court on November 19, 1959. On March 16, 1960, Plaintiff filed the third amended complaint herein.

"'With the declaration of taking and the various amended complaints and the stipulations in the case the tracts now involved may be placed in the following categories:

"In Possession or Use on July 2, 1957, and named in original complaint (Part of 255.07 acres):

Fee

414–1 Acreage specified in original complaint (20.00) acres changed by declaration of taking to 20.33 acres.

414–2 Description in original complaint charged and acreage enlarged by declaration of taking from 31.57 acres to 39.72 acres

414–E–7 Temporary easement of 15 years as sought in original complaint changed to perpetual easement by declaration of taking

"In Possession or Use on July 2, 1957 and Included in original complaint but not by same tract number as below (Not part of 255.07 acres):

Easement

422–E This narrow strip (0.11 acres) was a part of 414–E–2 included in original complaint. Most of 414–E–2 is no longer involved. The easement now sought is a perpetual easement instead of 15-year easement as originally sought.

"In Possession or Use on July 2, 1957, and first named in first amended complaint:

Easement

414–E–9 (0.37 acres) Temporary easement sought by first amended complaint increased by declaration of taking to perpetual easement

"Not clear whether in Possession or Use Since June 30, 1953 but named in amended complaints:

Easement

420–E (0.15 acres) Temporary easement sought by first amended complaint increased by declaration of taking to perpetual easement

"'The Government has continued to use and assert possession of all the tracts, with the possible exception for a time of Tract 420–E and for a time of part of 414–2, and also continued in possession of other tracts included in the aforementioned Case No. 624 Orl. Civ. No order of possession has ever been obtained in Case No. 857 Orl. Civ. nor did the Government file a declaration of taking prior to November 20, 1959, or make any deposit into Court prior to November 19, 1959.

"'The foregoing substantially states the substance of the stipulation between the parties and adds the fact of the filing of the declaration of taking and of the filing of the third amended complaint. Respective counsel have requested the Court upon this statement of fact to determine the date of valuation of the several tracts. This for the reason that counsel may arrange proof in accordance with the issue defined by the Court.

"'The Court therefore holds that November 20, 1959, the date of the filing of said declaration of taking, will be the date of valuation and the parties will submit proof of valuation as of such date.

"'Pre-Trial Order hereafter to be entered in this cause will include this determination.

[Paragraph omitted.]

"IT IS FURTHER ORDERED that Plaintiff's petition for a rehearing, except to the extent that it may have been granted by the foregoing amendment of said order of April 9, 1959, is hereby denied."

On its appeal the United States contends basically that the damages should be fixed as of July 2, 1957, the date of filing the present condemnation action, No. 857 Orl. Civ. The appellees contend that the court below fixed the correct date. We agree with

the appellees and hold that the date fixed by the court below was the correct date for fixing the damages.

What constitutes a taking by the United States in the exercise of its sovereign power depends on many factors, including the wording of the applicable constitutional or statutory provisions and the relationship between the parties affected by the act of taking. In a recent annotation[1] dealing primarily with the question of when interest on the award of damages should begin to run, but accepting that interest should be figured from the date of taking, the headings are enumerated under which the various times of taking have been established by various courts considering different states of facts.[2]

The Government relies chiefly on *United States* v. *Dow*, 1958, 357 U.S. 17, reversing *Dow* v. *United States*, 5 Cir., 1956, 238 F. 2d 898, as supporting its position. In that case the Government condemned an easement for a pipe line right of way acting under authority of the Second War Powers Act of 1942, 56 Stat. 177.[3] The strip of land, comprising 2.7139 acres

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[1] 36 ALR 2d pp. 447, et seq.

[2] (a) The time of the appropriation and the entry on the property;

(b) the time of the vesting of title; (c) the time of the filing of the declaration of taking; (d) the time of the notice of the intention to take; (e) the time of issuance of summons; (f) the time of filing of oath of appraisers; (g) the time of the injury to the property; (h) the time the property was actually entered upon and possession actually taken; and (i) miscellaneous dates based upon the peculiar facts of the individual case.

[3] Which reads in part as follows: " * * * The Secretary of War * * * may acquire * * * by condemnation, any real property, temporary use thereof, or other interest therein * * * Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occu-

through a body of 617 acres, was taken by the Government upon an order of court entered shortly after the filing of the condemnation petition, the order vesting right of immediate possession in the Government. Dow acquired his title to the strip more than two years after the United States had filed its condemnation proceedings and taken possession of the strip and laid the pipe line in it, and his title was taken subject to the condemnation proceedings.

The trial court granted summary judgment against Dow's claim to the money paid by the Government as compensation, holding that it violated the Anti-Assignment Act, 31 U.S.C.A. § 203. The Court of Appeals reversed, holding that the time of taking was fixed by the filing of a declaration of taking and the deposit of estimated compensation, which took place more than two years and seven months after the Government had entered into possession of the strip of land. This Court [4] held that the Declaration of Taking Act, 40 U.S.C.A. § 258(a), had removed much of the uncertainty existing prior to its passage by fixing a definite time of taking and of accrual of the claim for compensation. The opinion stated, however, that nothing said in it should be construed as inconsistent with the equitable rule that, where the declaration of taking was filed on a date subsequent to the passing of possession to the Government, the value of the property should be determined as of the

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pied, used, and improved for the purposes of this Act, notwithstanding any other law."

[4] In *Dow* v. *United States*, 238 F. 2d 898, citing two Fifth Circuit Cases, *11,000 Acres of Land, Etc.* v. *United States*, 152 F. 2d 566, certiorari denied, 328 U.S. 835, and *Anderson* v. *United States*, 179 F. 2d 281.

date possession was acquired. It relied heavily on the two cases of this Court cited in Footnote 4, supra.[5]

We do not consider the holding of the Supreme Court in *Dow* inconsistent with what the trial court did here. *Dow* stressed (357 U.S. at p. 19) that, under the terms of the Second War Powers Act, supra, the district court ordered the United States into the immediate possession of the strip of land condemned, and that the United States entered into physical possession and began laying the pipe line across the tract within ten days of the filing of the petition, completing it in 1943. We quote a portion of the Supreme Court's opinion (pp. 20–21):

> "For it is undisputed that '[since] compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment.' *Danforth* v. *United States*, 308 U.S. 271, 284; cf. *United States* v. *Dickinson*, 331 U.S. 745. We hold, contrary to the Court of Appeals, that the 'taking' did not occur in 1946 when the Government filed its declaration of taking, but rather *when the United States entered into possession of the land in 1943*. It follows that the landowners in 1943 were entitled to receive the compensation award and that Dow is not entitled to recover in this action." [Emphasis supplied.]

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[5] In the case reported in 152 F. 2d 568, it is stated: "We regard it as well settled that, either where no declaration of taking is filed or where, as here, the declaration of taking is filed on a date subsequent to the actual passing of possession, the market value of the property taken should be determined as of the date possession was acquired."

This same language was repeated in the latter case (179 F. 2d at 284) and several Supreme Court cases were cited as authority for the statement in each instance.

Following the foregoing quotation the court proceeded to define the two ways in which the United States normally takes property pursuant to its power of eminent domain (p. 21–22):

> "Broadly speaking, the United States may take property pursuant to its power of eminent domain in one of two ways: *it can enter into physical possession of property without authority of a court order; or it can institute condemnation proceedings under various Acts of Congress providing authority for such takings.* Under the first method—physical seizure—*no condemnation proceedings are instituted,* and the property owner is provided a remedy under the Tucker Act, 28 U.S.C. §§ 1346(a)(2) and 1491, to recover just compensation. See *Hurley* v. *Kincaid,* 285 U.S. 95, 104. Under the second procedure the Government may either employ statutes which require it to pay over the judicially determined compensation before it can enter upon the land, Act of August 1, 1888, 25 Stat. 357, 40 U.S.C. § 257 [the Declaration of Taking Act]; Act of August 18, 1890, 26 Stat. 316, 50 U.S.C. § 171, or proceed under other statutes which enable it *to take immediate possession upon order of court* before the amount of just compensation has been ascertained. Act of July 18, 1918, 40 Stat. 904, 911, 33 U.S.C. § 594; Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 176, 177 (*employed by the Government in the present case*).
>
> "Although in both classes of 'taking' cases—condemnation and physical seizure—title to the property passes to the Government only when the owner receives compensation, see *Albert Hanson Lumber Co.* v. *United States,* 261 U.S. 581, 587, or when the compensation is deposited into court pursuant to the Taking Act, see *infra,* the passage of title does not necessarily

> determine the date of 'taking.' The usual rule is that if the United States has entered into possession of the property prior to the acquisition of title, it is the former event which constitutes the act of taking. It is that event which gives rise to the claim for compensation and fixes the date as of which the land is to be valued and the Government's obligation to pay interest accrues. See *United States* v. *Lynah*, 188 U.S. 445, 470–471; *United States* v. *Rogers*, 255 U.S. 163; *Seaboard Air Line R. Co.* v. *United States*, 261 U.S. 299. The owner at the time the Government takes possession 'rather than the owner at an earlier or later date, is the one who has the claim and is to receive payment.' *23 Tracts of Land* v. *United States*, *supra*, at 970." [Emphasis added.]

These quotations from *Dow* emphasize the difference between that case and this one and, in our opinion, demonstrate the correctness of the judgment of the court below.

Nobody contends that the Government at any time resorted to the first method described in the *Dow* case—physical seizure—and nobody takes the position that these appellees are relegated to the Tucker Act to recover the just compensation due them. The parties to this action started out leasing this land by private treaty. But, though this was true, the Government decided to supplement the contractual relationship by resorting to court proceedings under the Eminent Domain Statutes.*

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* E.g., the parties to this litigation entered into the contract for a term beginning April 1, 1942, and ending June 30, 1942, with right of renewal during the continuation of the national emergency then existing. Nevertheless, the Government, in November, 1943, began condemnation proceedings seeking possession by order of court of the identical estates it already had in the parcels of land. The only difference between the

Moreover, the Government filed its case No. 624 Orl. Civ. on September 3, 1953, and operated under that taking through the end of the term covered by it, June 30, 1957. Its petition there had asked for the entry of an order of condemnation, but no order was ever entered. In lieu of the order the Government, four months after it failed its petition, *filed a declaration of taking* and paid into the registry of the court the sum estimated by the Government as just compensation. It continued to deposit such payments to the end of the term named in its *declaration of taking*.

In that case, the court entered an order, which presumably, is the last one ever entered, in which the court retained jurisdiction of the case for the periodic determination of rental compensation to the end of the term, which was to be determined by the Government's election, and for the entry of a final judgment. The order provided further:

> "In said final judgment the Court will also retain jurisdiction of this cause for the purpose of determining and making provision for the payment of just compensation for any failure on the part of Plaintiff when it surrenders the land to the Defendants on the expira-

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terms of the contract and the terms of the attempted condemnation was that, under the former, the Government had agreed to a rental of $5,347 per annum, whereas under the petition for condemnation, the Government estimated this compensation at the sum of $3,525 per annum. The Government deposited the amount of its estimate in court, but the court below held that the Government could not condemn property it already owned under contract when it sought only to reduce the amount of the annual rental payments. That action was affirmed by this Court, see *United States* v. *534.07 Acres of Land in Orange County, Florida, et al.*, 5 Cir., 1946, 157 F. 2d 828.

> tion of the original term condemned and extensions thereof, to return the land in as good condition as that existing at the time of the Plaintiff originally entering upon the same * * * In said final judgment, the Court will also retain jurisdiction for the payment of just compensation for any occupancy by the Plaintiff after the expiration of the terms which may be condemned or extensions thereof, whether such occupancy is in connection with making restoration of said premises or in connection with the exercise by the Plaintiff of its right to remove within a reasonable time after the expiration of the terms condemned or extensions thereof any and all improvements and structures placed thereon by and for the United States of America or for *whatever purpose said continued occupancy may be.*" [Emphasis added.]

That case, No. 624, is still pending and undisposed of and the parties to it—being the identical parties to the present civil action—are still bound by the terms of the orders entered in it. The judicial record therefore, refutes the suggestion that the parties before us were pursuing the seizure—Tucker Act route on July 2, 1957. The stipulation signed by the parties contained these words: "On July 2, 1957, the United States filed a suit to condemn (Case Number 857 Orl. Civ.) * * * The Plaintiff was in possession at the time of all of said tracts as it had a right to be under the provisions of the estate taken in Case No. 624 Orl. Civ. * * * *"*

The stipulation also stated: "* * * nor has the Government through any of its agencies notified the landowners that it has discontinued possession under Case No. 624 Orl. Civ. as to any part of said 25.07 acres. Nor has the United States, as Plaintiff in case No. 857 Orl. Civ., or otherwise, ever advised the land-

owners that it is in possession of any part of said land pursuant to case No. 857 Orl. Civ."

Under these undisputed facts it seems to us that the character of the possession by the United States of the interests in the lands sought to be condemned in this action (No. 857), filed July 2, 1957, was that fixed by the course of dealings between the parties, including the still pending judicial proceeding, No. 624. That possession bears no resemblance to the kind of possession the Government would have taken under the "physical seizure" method of obtaining possession which is discussed in the *Dow* case. Yet the entire thrust of appellant's argument is based upon the contention that the possession held by it on June 2, 1957 was one acquired by mere entry into physical possession, leaving the assumption that the appellees may pursue the remedy given them under the Tucker Act.[7]

To the above should be added the fact, also undisputed, that the acreage taken in fee and the estates carved out of the several parcels by the declaration of taking of November 20, 1959 differed materially from the acreage and estates described in the original complaint filed July 2, 1957. To take care of these changes the Government had filed two amendments to its original complaint, and filed a third amended complaint after the declaration of taking so as to conform the pleadings in the condemnation suit to the lands and estates actually acquired in the declaration of taking.

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[7] E.g., this statement appears in the appellant's brief: "The basic premise on which the Dow case rests is that the United States 'can enter into physical possession of property without authority of a court order; or it can institute condemnation proceedings * * *.'"

It is clear that the Government was uncertain as to exactly what it wanted until the time it filed the declaration of taking November 20, 1959. It was in full control of the pending litigation and could have entered an order of possession at any time, and could thereby have fixed the date as of which compensation should be figured. But it did not do that. It chose to proceed, under the Declaration of Taking Act, to file the declaration in the pending litigation and thereby to fix the exact date of taking and the precise lands and estates acquired by it. Not until that time had it determined exactly what it desired to appropriate, and not until that time did it perform any over act fixing the extent and terms of is appropriation and the precise rights of the landowners to compensation.[8]

We think it is clear that the first appropriation or taking which fixed the right of the United States to possess and of the landowners to collect just compensation was the declaration of taking of November 20, 1959, and that the court below correctly fixed that date as the time of taking.

The judgment of the lower court is, therefore, affirmed and the cause remanded for further proceedings consistent with this opinion.

AFFIRMED AND REMANDED.

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[8] See, in addition to *Dow*, *Danforth* v. *United States*, 308 U.S. 271; *United States* v *Westinghouse Electric & Manufacturing Co.*, 339 U.S. 261; *Kimball Laundry Co.*, v. *United States*, 338 U.S. 1, and *Benedict* v. *City of New York*, 2 Cir., 96 Fed. 789; and cf. *Goodyear Tire & Rubber Co.* v. *United States*, 276 U.S. 287; and *Olson* v. *United States*, 292 U.S. 246, 254.

APPENDIX B

JUDGMENT

EXTRACT FROM THE MINUTES OF SEPTEMBER 1, 1961

No. 18405

UNITED STATES OF AMERICA VERSUS McCRORY HOLDING COMPANY, ET AL.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed; and that this cause be, and it is hereby, remanded to the said District Court for further proceedings consistent with the opinion of this Court.

APPENDIX C

The two plats in the printed record (pp. 21–23 and 112–114)[1] show the two principal areas taken in this case as hatched or darkened areas. The various easements, etc., are designated by circled letters and arrows, the detail of which was lost in reduction in size and printing.

The following chart shows the details:

Tract No.		Estate Sought in Original Complaint	Declaration of Taking
414-1	20 acres	Fee	Fee.
414-2	31.57 acres	Fee	Fee—7.45 acres added.
414-E-3	0.88 acres	15-year sewer easement	Fee—added to 414-2.
E-4			
E-5			
E-6			
414-E-7	2.19 acres	15-year access road and water easement.	Perpetual easement.
414-E-9	0.36 acres	Added by first amendment to complaint which sought 15-year easement for underground water lines.	Perpetual easement.
[The deposit for Tracts 414-1, 414-2, 414-E-7 and 414-E-9 was $291,920.00.]			
414-E-2	1.89 acres	15-year easement for sewage treatment facilities.	Now 422-E 0.11 acres perpetual easement.
420-E	0.15 acres	Temporary easement for 15 years for sewer lines.	Perpetual easement.
[A nominal estimate of $1.00 was made for each of these easements.]			

Tract 414–E–1, 20.07 acres, a 15-year easement to discharge treated sewage into Lake Overstreet with various other rights in the Lake, was omitted from the Declaration of Taking and from the Third Amended Complaint which superseded the earlier ones.

[1] The plats were reversed when the record was printed so that the one at R 21–23 should be at R 112–114 and vice versa.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961.

No. 579.

UNITED STATES OF AMERICA,
Petitioner,

vs.

McCRORY HOLDING COMPANY ET AL.,
Respondents.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

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CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

SUMMARY OF ARGUMENT.

While counsel for the Government do not develop their argument under headings specifically tied to particular clauses of Rule 19(b), it is our understanding from the general course of their argument that they advance two grounds in support of their petition for certiorari:

first, that the Court of Appeals has decided a federal question in a way in conflict with an applicable decision of this Court; and, second, that the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

In the first two sections of our argument we will make specific reply to these two claims of petitioner. (While our section headings do not make reference to these two claims of petitioner as such, the two sections are intended as replies to the two claims.) In the third section of our argument we will briefly outline our position that the Question Presented, as stated in the petition for certiorari (p. 2), while "an unsettled question," is not a substantial question in the light of *Danforth* v. *United States*, 308 U.S. 271, text 284, 84 L. Ed. 240, text 246. (We do not completely accept petitioner's "Question Presented," as we will later discuss.)

ARGUMENT.

I.

To Sustain Petitioner's Contention Would Not Call for a Mere Application of United States v. Dow; It Would Call for a Marked Extension of the Dow Case.

The claim of counsel for petitioner that the Court of Appeals has decided a federal question in a way in conflict with an applicable decision of this Court is based on counsel's claim that there has been here a misapplication of (or a failure properly to apply) the decision of this Court in *United States* v. *Dow*, 357 U.S. 17, 2 L. Ed. 2d 1109.

We realize that sometimes "the line between an unsettled question and possible misapplication of prior de-

cisions is shadowy" (p. 273 of 48 Harvard Law Review), but we respectfully submit that definitely here the contention counsel for the Government are making is with respect to the determination of an unsettled question or unsettled questions and not a "misapplication" of (or a failure properly to apply) the Dow decision. We accordingly submit that the question of whether this Court should review the decision of the Court of Appeals should be determined on the basis not alone of the validity or non-validity of the extension of the Dow case which the Government is here seeking but also on whether it is sufficiently important that the validity or non-validity of the extension of the Dow case so sought be authoritatively determined by this Court.[1]

It is the Government's position that under the Dow case the date of valuation for the taking, or proposed taking, of the fee to Tract 414-1 (and the other takings or proposed takings) should be July 2, 1957, the date of the filing of the complaint. Basing its argument on the Dow case, the Government contends that in the present case the date of the filing of the declaration of taking (November 20, 1959) is without significance and that the significant date is the date of the filing of the original complaint.

It is not our purpose in this Brief to discuss the Dow case in detail but we do wish to point out the factual situation in that case (which factual situation in connection with the factual situation here will, we feel, speak for itself in demonstrating that here we are not dealing at all with any question of a mere application of the Dow case):

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1. Compare: "It is of course impossible for the Court to interfere in every instance of analogical extension of old precedents to fit new problems." (p. 273 of 48 Harvard Law Review).

In the Dow case condemnation proceedings were filed in March, 1943. As requested in the petition, the District Court ordered the United States into the "immediate possession" of the strip of land involved. Within the next ten days the United States entered into physical possession and began laying a pipe line through the tract. In May, 1946, the Government filed a declaration of taking, under the Declaration of Taking Act. In this Court's opinion (p. 27 of 357 U.S.) the Court stated:

> "In the present case there is no dispute over the fact that the United States appropriated Parcel 1 on the date that it entered into physical possession *under order of the District Court.*" (Emphasis ours).

The question that this Court answered was stated as follows by the Court (p. 18 of 357 U.S.):

> "The principal question presented is whether the claim to 'just compensation' vested in the owners of the land at the time the United States entered into possession of the easement *pursuant to court order* in 1943, or whether such claim vested in the respondent, Dow, who acquired the land in 1945, at the time the United States filed a declaration of taking in 1946, under the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C., Secs. 258a-258e." (Emphasis ours).

This factual statement shows the total dissimilarity of the Dow case to the instant case. In the Dow case the Government was not in possession prior to the date upon which it filed its petition to condemn. In the instant case, the Government, when it filed its petition or complaint, was in possession of the land sought to be acquired and other land amounting in all to 255.07 acres (R. 84, 80) and had been in possession of such land for over 15 years (R. 78, 1) prior to the date it filed its petition to condemn the fee title to

Tract 414-1 and the interests sought in the other tracts. In the Dow case the Government obtained an order of possession and *went into possession pursuant to that order*, and the declaration of taking was not filed until long after there had been a definite overt act of taking, that is, the Government going into possession pursuant to order of Court. In the instant case, there was not at any time prior to the filing of the declaration of taking any overt act of taking, and the Government had not prior to November 20, 1959, either obtained an order of possession or filed a declaration of taking. In the instant case the only thing that can in all reason be claimed to be an overt act of "taking" is the filing of the petition to condemn.[2] The only thing which the Government did in this case which it did in the Dow case (and the only similarity of the two cases) is that in both cases the Government filed a petition to condemn but it was not the filing of the petition to condemn which was held to be the act of taking in the Dow case.

The Government's basic position in the instant case is that the filing of a petition to condemn can be, and under the circumstances here was, an act of taking. Whether such position is sound or unsound, it is clear that the Dow case did not hold the position to be sound. If the Government's contention is sustained, it will be by an extension of the Dow case—not by an application of that case.

---

2. At page 10 of the petition counsel for the Government assert that "the keeping of possession plus the filing of a complaint to condemn the fee were the acts by which the government appropriated the property (the fee) to public use." We submit that the continuation of possession can scarcely be deemed an act of appropriation of the fee at all, and that what counsel for the Government are in effect claiming is that while the filing of a petition to condemn does not ordinarily constitute an overt act of taking, it does constitute an overt act of taking when the Government is already in possession of the property.

II.

There Is No Sufficient Public Importance for This Court to Be Called upon to Settle the "Unsettled Question" or "Unsettled Questions" Which the Court of Appeals Determined in the Present Case.

A. The Fact That the Decision of the Court Below Will Substantially Increase the Cost of the Condemnation Here Involved Manifestly Affords No Predicate for the Granting of Certiorari.

Apparently as an argument in support of the granting of certiorari, counsel for the Government in their petition (p. 14) make the following statement:

> "In the present case, there apparently has been a substantial increase in the value of the land during the 28-month interval between expiration of the temporary taking and filing of the declaration of taking. During the current period of rising real estate values, the rule promulgated by the court below will substantially increase the cost of federal condemnation."

It is not entirely clear to us as to exactly what counsel for the Government are contending in this connection.

On the one hand, they may be contending that this Court should grant certiorari because in the case of condemnations after temporary takings, a court holding that the mere filing of a petition to condemn the fee title does not itself constitute a "taking" will increase the cost of federal condemnation generally in the current period of rising real estate values. If this is what counsel are contending, such might be a relevant consideration in determining public importance if the occasions are in fact sufficiently numerous when condemnations to acquire fee titles do follow temporary takings and if it is a fact that, under the holding of the Court of Appeals here, there is in such condemnation suits no practical way for the Govern-

ment to protect itself against rising real estate values. The actual extent, however, of the recurrence of the problem has not been adequately shown nor is there any indication at all that the Government does not have practical means already at hand for protecting itself against rising real estate values.

If counsel for the Government, by the quoted statement, are contending that this Court should review the decision of the Court of Appeals in this case because such decision will increase the cost of our particular condemnation over and beyond what such cost would be if the decision had been different, we submit that such contention is not relevant at all. This Court does not grant certiorari because a case is important to a party as such or to give a party defeated in a court of appeals another hearing. We respectfully submit that certiorari should not be granted unless review by this Court would be the providing of some guidance that is really needed and that is important to be had in future cases. In condemnation litigation the Government is, of course, to be treated as any other party and the nature of the question to be reviewed rather than the question of which party lost in the court of appeals and is seeking certiorari in this Court should be the important factor. In condemnation litigation the United States Government is

> "but a party in interest having no greater standing or rights than those possessed by the former landowners. United States v. Dunnington, 146 U.S. 338, 351, 13 S. Ct. 79, 36 L. Ed. 996; United States v. Miller, 317 U.S. 369, 63 S. Ct. 276, 87 L. Ed. 336, 147 A.L.R. 55; United States v. Certain Lands in St. Louis, Mo., D.C. E.D. Mo., 41 F. Supp. 809."
>
> *United States* v. *Certain Parcels of Land*, 151 F.2d 116, text 117 (C.A. 2d).

B. This Case if Reviewed by This Court Would Not Necessarily Turn on One Legal Proposition Only But, Depending on This Court's Ultimate Views, Might Involve a Number of Legal Questions.

We do not understand counsel for the Government to contend that the filing of a petition to condemn is in all instances a "taking" of property. It is our understanding that counsel are contending that the filing of a petition can, under certain circumstances, be a "taking" of property. We ourselves contend that the filing of a petition is not itself a "taking" of anything. If the decision of the Court of Appeals here should be reviewed by this Court, and if on such review this Court should sustain our position that the filing of a petition to condemn is not itself a "taking" of anything, that would, of course, be an end to the matter.

If, however, this Court on a review by it of the decision of the Court of Appeals should determine that the filing of a petition to condemn can, under certain circumstances, be a "taking" of property, that would be merely the beginning of what would be necessary to determine this case because it would then be necessary to determine whether the circumstances exist here under which the filing of a petition to condemn does amount to a "taking". And it happens that the circumstances are not the same on all the tracts but vary greatly as between the different tracts. In particular, the situation with regard to Tract 414-1 is entirely different from the situation with regard to the other tracts. In discussing whether there would be any public importance involved in having the decision of the Court of Appeals reviewed, we feel that it will be desirable to discuss the situation with regard to Tract 414-1 separately from the situation with regard to the other tracts. It is respectfully submitted that our further discussion will make it clear:

1. That while on certiorari granted a decision of this case by this Court could rest on the decision of a single legal proposition, viz., that a petition to condemn cannot itself be a "taking" of anything, there is no certainty that such would be the conclusion reached as the whole purpose of the Government on this case is to obtain a holding directly to the contrary of this proposition; and

2. If the decision by this Court should be that a petition to condemn can under certain circumstances be a "taking", it would then be necessary for this Court to determine a number of propositions, that is, not only whether the filing of the original complaint was a "taking" but also whether each of the amended complaints was a "taking" and, if so, of what.

C. There Has Been in the Petition for Certiorari No Sufficient Showing That the Public Interest Requires a Review by This Court of the Decision of the Court of Appeals As to Tract 414-1.

The "Question Presented" as stated by counsel for the Government at page 2 of the petition is more nearly applicable to Tract 414-1 than to any of the other tracts involved in the suit but even as to Tract 414-1 it is not a full or an entirely correct statement of the exact question presented for the following reasons:

1. No question of a valuation "as of the date of the trial" is in any way presented by this case at the present time. The first order of the District Court (R. 87-90) did provide that the date of valuation was to be the date of trial (R. 90) but that order was entered before any declaration of taking was filed and the amended order, the order appealed from and which was entered after the declaration of taking was filed, fixed the date of the filing of the declaration of taking as the date of valuation (R. 135).

2. The question stated omits reference to the fact that at the time of the filing of the condemnation suit referred to in the question the United States Government was in possession not only of the land of which the fee title was sought (and other land in which limited interests were sought) but also of a large further acreage not in any way involved in the condemnation suit filed (R. 83).

3. The question stated omits reference to the fact that in a previous condemnation suit (the suit in which there had been a temporary taking) the Court had entered an order contemplating that there might be a holding over by the Government for a period of time after the stated period of the temporary taking expired and further contemplating that the Court would assess just compensation for any period of time during which the Government might so be in possession (R. 81-84).

4. The question stated omits reference to the fact that there was an interval of time between the expiration of the stated period of the temporary taking and the filing of the condemnation suit to acquire the fee (R. 81, 1).

5. The question stated omits reference to the fact that the Government never in any way notified the landowners that it had discontinued possession of any part of the land involved in the previous condemnation suit and never advised the landowners that it was in possession of any land under the suit filed to condemn the fee (R. 85).

6. The question stated omits reference to the fact that in the condemnation suit to acquire the fee there was no order of possession entered by the Court (R. 85) and no overt act of any kind on the part of the United States indicating that it had in fact taken the fee title to the tract of land referred to.

The facts of our case so far as Tract 414-1 is concerned are so far peculiar to our case that there would be no assurance at all that any decision in our case on Tract 414-1 would actually afford valuable guidance on any specific case that might arise in the future in which the suit filed might seek to condemn a fee interest after the Government had been in temporary possession. If, however, we assume that a decision by this Court on Tract 414-1 would actually afford specific guidance on some cases in the future, it still has not been shown that there is any public importance calling for a review by this Court as to Tract 414-1 for two reasons:

1. Counsel for the Government content themselves with asserting that "the government frequently condemns the fee interest after it has entered into temporary possession" (p. 14) and this relative term "frequently" without some further indication of the exact extent that the situation does actually arise does not have any tendency to show any public importance in having the question decided.

2. It is obvious that the Government can very readily protect itself against rising real estate values by obtaining an order of possession and advising the landowner that it has gone into possession under such order of possession. Where the Government can so readily protect itself in so simple a manner, we respectfully submit that there is clearly no public necessity shown for a decision by this Court to provide guidance in situations which need never arise.

D. Passing at This Time the Status of Tract 414-1, It Is Clear That Each of the Tracts Other Than Tract 414-1 Is in a Situation Sui Generis and a Decision by This Court with Respect to Such Other Tracts Would Not Afford Guidance in Future Cases Likely to Arise. However, if the Decision of the Court of Appeals Were Reversed As to Tract 414-1, It Would Be Grossly Unfair to Likewise Reverse the Decision As to These Other Tracts Without Going Into Their Particular Situations and Giving Some Specific Directions to the Lower Courts Regarding These Other Tracts.

The basic position of counsel for the Government is that the filing of a petition to condemn can under certain circumstances be an act of "taking". We dispute this basic position. If, however, this Court on a review of the case should determine that the filing of a petition to condemn can under some circumstances be an act of "taking," the question would still remain whether those circumstances exist in the present case. And in determining that those circumstances do exist, it is clear that while the situation with regard to Tract 414-1 is comparatively simple, the situation with the regard to each of the other tracts is extremely complex. If a petition to condemn can be an act of "taking," there would in that view of the case, as we will later point out in more detail, be many, many legal problems involved in determining the date or dates of taking of the particular interests at various times sought by the complaint and the several amended complaints from time to time filed. In other words, if the filing of an original complaint is an act of "taking," is the filing of an amended complaint a separate and distinct act of "taking" or how do you fit amended complaints into the concept of petitions to condemn constituting acts of "taking"?

Before the Court of Appeals, counsel for the Government attempted to sidestep these complexities by contend-

ing that any consideration of the details of the various amendments to the original complaint would only lead to confusion and that it was only necessary for the Court of Appeals to determine the situation with regard to Tract 414-1 ("property possessed by the United States on July 1, 1957, and of which fee title was described in the original complaint, all amendments and the declaration of taking") and that the basic principle being thus established, the detailed applications (that is the applications to tracts other than Tract 414-1) were matters to be determined upon remand after the basic principle was established.

We respectfully submit that if the decision of the Court of Appeals should be reviewed by this Court, it would be grossly unfair (if the basic position of petitioner should be sustained) for the situation with regard to Tract 414-1 only to be specifically considered and for the matter to be left up in the air with regard to the other tracts. It is oftentimes said that justice delayed is justice denied. Case No. 857 was filed on July 2, 1957 (R. 1); the first order of valuation was entered by the District Court on April 9, 1959 (R. 87-90); a Motion to Amend Order of April 9, 1959, was filed by the United States Attorney on April 17, 1959 (R. 92-93) and in this he sought to have the order amended to include language which would permit him to apply for an interlocutory appeal; on the same date he also filed a petition for rehearing (R. 90-91); on May 16, 1950, the District Court ruled on both the Motion to Amend and the petition for rehearing (R. 131-136) and entered the order that was appealed to the Court of Appeals. This order contained the finding required by Section 1292(b), Title 28, United States Code (R. 135-136), which, among other things, was that an immediate appeal from the order "*may materially advance the ultimate termination of the litigation*" (Emphasis ours).

The two purposes of the adoption of Section 1292(b) were expedition of litigation and the saving of useless expenditure of court time on retrials after correction of basic error on appeal (Senate Report, 1958 U. S. Code Cong. and Adm. News, p. 5255). We respectfully submit that both of these purposes would be defeated if this case were reversed by this Court on a determination with respect to one tract only and with the status left up in the air as to the other tracts.

We realize, of course, that if the public interest imperatively required the setting to rest of a question which could be set at rest by reference to one tract alone and if any determination as to other tracts would require an inordinate amount of the time of this Court, it would be within the discretion of this Court to make a determination with regard to the one tract only that the public interest called for and then leave the application of the principles established in such determination to the Court of Appeals or to the District Court. However, in determining whether to exercise this Court's discretion in that regard it is respectfully submitted that a greater degree of public importance should be required where a part only of the case is to be determined than in a situation where the application to the whole case of the principles adjudicated can be determined by this Court without an undue expenditure of the time and effort of this Court, and that particularly should this be the case on an appeal under Section 1292(b). If a review by this Court may retard the ultimate termination of the litigation rather than advance it, such fact on a case appealed under Section 1292(b) ought to be a material factor in a determination of whether to review the case. If there is a public importance as to one tract but one tract only and if the public importance with regard to that one tract is purely marginal, that might well be

a decisive consideration in determining not to review the case at all.

It is submitted that in considering the question of the granting of certiorari, the determination should be made on the basis that, if granted, it will be necessary for the Court to go into a multitude of problems the solution of which will be of doubtful utility in the general mass of condemnation litigation likely to arise in the future.

What are some of these problems?

Consider first Tract 414-2:

The original complaint filed July 2, 1957, referred to a tract 414-2 (R. 9) but the tract referred to was a far different tract from the Tract 414-2 as actually taken by the declaration of taking (R. 100, 101). The original complaint sought to take 31.57 acres (R. 9). The declaration of taking actually took 39.72 acres (R. 101). To some extent the additional land was made up of some areas previously mentioned in other respects in the original complaint. These areas (small areas) were Tracts 414-E-3, 414-E-4, 414-E-5 and 414-E-6 in the original complaint (R. 13-16). While these small areas are now a part of Tract 414-2 in the declaration of taking, there were 7.47 acres of land taken by the declaration of taking in its description of Tract 414-2 that were not in any way described in the original complaint. There were changes made in the first amended complaint from the original complaint and changes in the second amended complaint from the first amended complaint; there were changes in the declaration of taking from all three previously filed complaints.

If it should be the holding that a petition to condemn can be a "taking" and that one or more of the petitions to condemn here did in fact constitute a "taking", the follow-

ing would be some of the questions to be answered as to the date or dates of the "taking" of what is set out as Tract 414-2 in the declaration of taking:

Was the fee title to all of the 39.72 acres described in the declaration of taking (R. 100-101) taken when the Government filed its original complaint seeking to condemn the fee title to 31.57 acres only (R. 9, 10)? (When the Government seeks to condemn the fee to a part only of a larger tract, does a purchaser of the rest of the larger tract run the hazard of having his purchase confiscated by a retroactive amendment of the complaint?)

If the fee to only 31.57 acres was taken when the original complaint was filed, was the fee to the remaining 8.15 acres taken only when the declaration of taking was filed or when was it taken?

Was anything taken so far as Tracts 414-E-3, 414-E-4, 414-E-5 and 414-E-6 are concerned, when the original complaint was filed, in which petitioner sought 15-year easements (R. 25) in those tracts (R. 13-16)?

What was the effect of the first amended complaint, in which petitioner dropped Tract 414-E-6 (R. 41-42), changed the descriptions of the other three tracts (R. 39-41, 13-15) and changed the nature of the estate sought to be taken in each tract (R. 50-51, 25)?

What was the effect of the second amended complaint in which further changes were made in the estates sought to be taken in these tracts (R. 75-76, 50-51)?

If there were "takings" of some character when the original complaint was filed on July 2, 1957, and there were severance damages resulting from such "takings," would the severance damages be disregarded in the assessment of compensation after the amended complaints and the

declaration of taking were filed or, if not, on what basis would the severance damages be assessed?

Problems as substantial and numerous arise with regard to Tracts 414-E-7, 414-E-9, 420-E and 422-E:

The land description of Tract 414-E-7 in the declaration of taking is materially different from its description in the complaint filed July 2, 1957 (R. 17). More important, the declaration of taking actually took a permanent easement in Tract 414-E-7 (R. 97) whereas the original complaint sought only a 15-year easement (R. 25, 26). Can it be that there was a "taking" of a permanent easement on July 2, 1957, when only a 15-year easement was sought at that time and the first time a permanent easement was injected into the case was the filing of the declaration of taking on November 20, 1959?[4] (While the Government at p. 13 of the petition concedes that the additional area not described in the original complaint at all, and apparently as well the areas described in the original complaint but there referred to as easement areas, cannot be valued as of the time of the original complaint; but the Government ap-

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3. While petitioner in the footnote on page 13 attempts to disparage any importance to be attached to the valuation of the easements inferring that the maxim *de minimis non curat lex* should apply, it is obvious from the location of Tract 414-E-7 that that tract is a valuable property and there is nothing in the record to indicate that all of the tracts are not in fact of very substantial value. The Government's estimate of a nominal value on Tracts 420-E and 422-E is, of course, not of any force whatever against the landowners, and on Tracts 414-E-7 and 414-E-9 the estimated compensation was not separately set out but these two tracts were included with Tracts 414-1 and 414-2 in a total estimated compensation of $291,930.00 (R. 97, 103).

4. Is it possible when the Government files a suit to condemn a temporary easement on a piece of land that no purchaser can buy the land without running the hazard of having his investment confiscated by an increase in the estate sought from a temporary easement to a permanent easement?

parently contends on the same page that there is a different rule when a temporary easement is increased to a permanent easement and that the permanent easement, although no one knew until the declaration of taking was filed that it was sought, should nevertheless be valued as of the date the original complaint was filed and sought a temporary easement.)

The first time Tract 414-E-9 was mentioned in this case was October 2, 1958 (R. 30, 44), when the first amended complaint was filed. At that time a 15-year easement was sought (R. 51). Not until the filing of the declaration of taking was the permanent easement sought (R. 96). Could there be a taking of a permanent easement at any time prior to the declaration of taking? Was anything at all taken when the original complaint was filed? Was a 15-year easement taken when the first amended complaint was filed?

The land referred to as Tract 420-E in the declaration of taking was not a part of the 255.07 acres which had been involved in Case No. 624 and the Stipulation of Counsel does not cover whether Tract 420-E was or was not in possession of the United States on July 2, 1957. With these exceptions and the further exception that Tract 420-E was not mentioned in the original complaint in Case 857 by that tract number or as belonging to respondents here, Tract 420-E is in the same situation as Tract 414-E-7 as above referred to.

What is designated Tract 422-E in the declaration of taking (R. 110) was a part of Tract 414-E-2 in the original complaint (R. 38). Tract 414-E-2 was not a part of the 255.07 acres which had been involved in Case No. 624 but the Government was in possession of it on July 2, 1957. The original complaint in Case 857 sought a 15-year easement

in Tract 414-E-2 for "sewage treatment facilities" (R. 25). The first amended complaint sought a 15-year "term of years" in Tract 414-E-2 (R. 50). The second amended complaint sought the "exclusive use for a period of 15 years" of Tract 414-E-2 (R. 75). The declaration of taking dropped all of Tract 414-E-2 except what it referred to as Tract 422-E and sought a permanent easement over Tract 422-E for "underground sewer and water lines" (R. 96). The following are among some of the questions which occur if a petition to condemn is to be considered a "taking": Was there a taking of a 15-year easement over and across Tract 414-E-2 for sewage treatment facilities on July 2, 1957? Was there a taking of a 15-year term of years over Tract 414-E-2 on October 2, 1958, when the first amended complaint was filed? Was there a taking of the "exclusive use" of Tract 414-E-2 for a period of 15 years when the second amended complaint was filed on December 8, 1958? Was there a taking of a permanent easement over Tract 422-E on November 20, 1959, when the declaration of taking was filed?

The above illustrate some of the many problems that are presented in this case if the Government's theory is accepted that the filing of a petition to condemn can be a "taking" of property. We respectfully submit that if certiorari should be granted and if on such certiorari the Government's basic theory that the filing of a petition to condemn can be a "taking" of property should be accepted, it would be only fair to the landowners that specific answers be given to the many intricate problems that acceptance of the Government's basic theory would involve in the present case.

It is submitted further that while there are "unsettled questions" here involved, there is no "unsettled question" in the present case of sufficient pressing and current im-

portance for the Court to take the time to devote to this case which the interests of justice would require be taken if the case is to be reviewed at all.

III.

Not Only Is the "Question Presented" As Stated by Petitioner Somewhat Incomplete, Not Entirely Accurate and So Far As Applicable at All Applicable to Only One Tract, but It Does Not Actually Present Any Substantial Question in View of Danforth v. United States, 308 U.S. 271, Text 284.

Under the *Dow* case (257 U.S. 17, 2 L. Ed. 2d 1109) there is no question that if the Government files a suit to condemn a piece of property and upon the filing of the suit procures an order of possession and enters into possession pursuant to such order, there has been a "taking" of the property.

Another proposition which, while not specifically covered by the Dow case, would seem not fairly open to question is that if the Government already in possession under a temporary taking files a suit to condemn the fee and then obtains an order of possession and notifies the owner that it has gone into possession under the order of possession, such notification after the obtaining of an order of possession is to be treated as equivalent to the "entry" into possession referred to in the Dow case.

What we are dealing with here is something else entirely. What counsel for the Government are here contending for is something far beyond what was held in the Dow case. What they are contending is that when the Government is already in possession of property and files a petition to condemn the fee title, the filing of the petition to condemn is itself a "taking" of the property without any order of possession being obtained and without any

notification to the owner that the Government is in possession under the suit to acquire the fee. This, we respectfully submit, is directly contrary to the rationale of *Danforth* v. *United States*, 308 U.S. 271, Text 284, 84 L. Ed. 240, Text 246, in which this Court made clear the limited effect and sole purpose of a mere petition to condemn, viz., that it is a means by which the sovereign may find out what any piece of property will cost:

> "The determination of the award is an offer subject to acceptance by the condemnor and thus gives to the user of the sovereign power of eminent domain an opportunity to determine whether the valuations leave the cost of completion within his resources. *Condemnation is a means by which the sovereign may find out what any piece of property will cost.*" (Emphasis ours)

Compare:

> *Kanakanui* v. *United States*, 244 Fed. 923 (C.A. 9);
> *United States* v. *Johns*, 146 F.2d 92 (C.A. 9);
> *Benedict* v. *City of New York*, 98 Fed. 789 (C.A. 2).

In view of the Danforth case, we respectfully submit that the question presented as tendered by the Government is not one of substance.

CONCLUSION.

Our first position in opposition to the granting of certiorari is that we are not here dealing with any decision of the Court of Appeals which could possibly be said to be in conflict with a decision of this Court (*United States* v. *Dow* in particular) but that what counsel for the Government are contending for is an extension of the Dow case rather than an application of that case.

Our further position is that in view of the Danforth case the question presented by the Government is not one of substance but that, if it were, the decision by this Court of the various detailed propositions involved in determining dates of taking in this case would take up time of this Court out of all proportion to any public importance there might be in making such determinations, that there has been no adequate showing of the frequency in which any of the problems presented are likely to recur and that the Government is already in position to adequately protect itself against rising real estate values by the simple expedient of obtaining an order of possession and notifying the landowner that it has entered possession under such order of possession. We respectfully submit that no adequate reason has been advanced for a review by this Court of the decision of the Court of Appeals and that the certiorari sought should be denied.

Respectfully submitted,

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